June 27, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Ex Parte Presentation, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Streamlining Deployment of Small Cell Infrastructure*, WT Docket No. 16-421

Dear Ms. Dortch:

When the Commission launched these proceedings, it correctly found that "the deployment of next-generation wireless broadband has the potential to bring enormous benefits to the Nation's communities," and thus that "there is an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and state reviews, or otherwise."[1] Earlier this year, acting on evidence that its environmental and historic preservation review processes were slowing wireless deployment, the Commission modified its rules to more effectively target those reviews and streamline those processes.[2] CTIA commends the Commission for taking such comprehensive action.

The Commission should now exercise its authority to take similar action to accelerate broadband by addressing local regulatory barriers. Although some localities are cooperating with

[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330, 3331 ¶¶ 1-2 (2017) ("*Accelerating Wireless Broadband Deployment NPRM*").

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Second Report and Order, FCC 18-30 (rel. Mar. 30, 2018).

providers to approve construction of the broadband networks their citizens increasingly depend on, many others are enforcing a web of complex, burdensome, and costly regulations that impede deployment – or are preventing deployment altogether. The Commission should exercise its authority to interpret Sections 253 and 332 of the Communications Act and set out the standards and guideposts against which state and local actions will be judged.

In addition, while the record documents numerous obstacles, the Commission should address five specific types of regulations or requirements that have been identified as substantially delaying or deterring service. There is an urgent need to address these obstacles in particular, as they are severely impeding deployment and preventing investment in wireless infrastructure necessary to provide broadband services:

- Moratoria, whether express or *de facto*
- Denial of access to municipal-owned utility poles and other structures
- Requirements that all facilities along rights-of-way ("ROWs") be underground
- Requirements to prove a service coverage gap or other business need
- Subjective or unpublished aesthetic restrictions or those that discriminate against wireless deployment

Eliminating these regulatory obstacles will clear the way for more investment in broadband services across the country, and put that capital to work faster. It will foster and speed construction of the networks the United States needs for its future. And as more investment flows into communities nationwide, it will provide more jobs and bring new services to those communities. There can be no clearer "win-win" for achieving the policy goals of these proceedings.

The Commission Has Ample Authority to Address Barriers to Wireless Deployment. The Commission has clear authority to address these barriers. In Sections 253 and 332 of the Communications Act, Congress enacted into law a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."[3] Section 332 requires the Commission to

[3] Telecommunications Act of 1996, Conference Report 104-458, 104th Cong., 2d Sess., at 1 (1996).

consider whether its regulation of mobile services will, among other things, "reduce the regulatory burden on spectrum users," "encourage competition and provide services to the largest feasible number of users."[4] Both Sections 253 and 332 also give force to that national policy by prohibiting state and local regulations or requirements, or wireless facility siting decisions, that "may prohibit or have the effect of prohibiting" service.[5] The Commission is the expert agency charged with interpreting its governing statute to ensure it is applied to fulfill the statute's overarching purpose and achieve the policy objective in these proceedings – to accelerate broadband investment by removing regulatory barriers.

Shortly after Congress adopted Section 253, the Commission interpreted Section 253(a), finding that a state or local requirement "may prohibit or have the effect of prohibiting" service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[6] The Commission should affirm *California Payphone* and clarify that the "materially inhibits or limits" standard captures not only regulations that actually prohibit service, but also those that "effectively prohibit" service by imposing substantial barriers to deployment. The Commission should prohibit such barriers, including in particular those discussed below.

The record provides ample evidence that the Commission should act.[7] Some of the barriers discussed herein (*e.g.*, moratoria or undergrounding mandates) block wireless deployment outright. Others impose regulations or fees that deter service. Such barriers include restrictions or requirements that inhibit deployment by significantly increasing costs or imposing other obligations, or by discriminating against wireless providers by subjecting them to restrictions, fees, or requirements that are not imposed on other providers.

---

[4] 47 U.S.C. § 332(a).

[5] 47 U.S.C. §§ 253(a), 332(c)(7)(B)(I)(II).

[6] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Calif.*, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997) ("*California Payphone*").

[7] Regulatory barriers cited in this letter were identified in comments and reply comments filed in March and April 2017 in WT Docket Nos. 16-421, and in comments and reply comments filed in June and July 2017 in WT Docket No. 17-79.

These barriers cannot be justified as protecting localities' interest in recouping their costs, managing the visual impact of network facilities, or protecting public safety, because they go far beyond achieving those interests. They are particularly ill-suited for the small cell networks the industry must build to continue to meet public demand. These types of regulations are antithetical to the "fair and balanced legal and regulatory environment" required by *California Payphone*, and harm consumers by delaying and deterring deployment.[8] The Commission should conclude that these types of barriers are inimical to the language and purpose of Section 253(a).

***Moratoria*.** The Commission should issue a declaratory ruling or adopt a rule that moratoria on accepting or processing wireless siting applications violate Sections 253(a) and 332(c)(7)(B)(i). The record demonstrates that some localities are blocking deployment through two types of moratoria: Express moratoria typically take the form of ordinances that expressly prohibit the department or agency responsible for processing siting applications from doing so, while *de facto* moratoria result from a locality's decision to "freeze" the processing of applications or refuse to accept new ones.[9] For example, jurisdictions in New York, Florida, Iowa, California, Minnesota, Ohio, Texas, and Washington enacted wireless siting moratoria, some dating back as far as 2014.[10] Myrtle Beach, South Carolina and DeKalb County, Georgia refused to process requests to deploy small cell facilities,[11] and Jefferson

---

[8] *California Payphone*, 12 FCC Rcd at 14206 ¶ 31.

[9] See a examples of numerous express and *de facto* moratoria in Lightower Networks Comments, WT Docket No. 17-79, at 14 (filed June 15, 2017) (85 small cells blocked by moratoria in four states); CTIA Comments, WT Docket No. 17-79, at 23-25 (filed June 15, 2017) ("CTIA Comments"); AT&T Comments, WT Docket No. 17-79, at 14 (filed June 15, 2017) ("AT&T Comments"); Mobilitie Comments, WT Docket No. 16-421 (filed Mar. 8, 2017) ("Mobilitie PN Comments"); T-Mobile Comments, WT Docket No. 17-79, at 36-38 (filed June 15, 2017) ("T-Mobile Comments") (explaining that many localities lacked a clear application process, and others refused to process applications); Verizon Comments, WT Docket No. 16-421, at Appendix A (filed Mar. 8, 2017) ("Verizon PN Comments"); CTIA Reply Comments, WT Docket No. 17-79, at 15-16 (filed July 17, 2017) ("CTIA Reply Comments"); Crown Castle Comments, WT Docket No. 17-79, at 14-19 (filed June 15, 2017) ("Crown Castle Comments"); Sprint Comments, WT Docket No. 16-421, at 18-19 (filed Mar. 8, 2017 ("Sprint PN Comments").

[10] Verizon Comments, WT Docket No. 17-79, at 6 (filed June 15, 2017); T-Mobile Reply Comments, WT Docket No. 16-421, at 9 (Apr. 7, 2017) ("T-Mobile PN Reply Comments"); Mobilitie PN Comments at 10-11; CTIA Comments at 23; Competitive Carriers Association Comments, WT Docket No. 16-421, at 31-33 (filed Mar. 8, 2017); AT&T Comments at 14.

[11] Wireless Infrastructure Association Comments, WT Docket No. 17-79, at 11 (June 15, 2017) ("WIA Comments").

Parish, Louisiana refused to grant a provider's application for a franchise even though it had granted others.[12]

Sections 253(a) and 332(c)(7)(B)(i) outlaw actions that prohibit or have the effect of prohibiting deployment. There is no more absolute prohibition on deployment than refusing to accept or act on applications. A local law that bars acceptance of applications and a local agency's refusal to act on them have precisely the same impact – no deployment is permitted – and they are thus *per se* unlawful.

The Commission should prohibit both open-ended moratoria and those with a time limit. Moratoria block deployment even where localities label them "interim" or they are time-limited. For example, a locality that prohibits accepting siting applications for six months blocks new deployment for at least that period. Moreover, localities can and do extend such "temporary" moratoria. Sections 253(a) and 332(c)(7)(B)(i) do not exempt temporary bans because they have the same impact – no deployment can occur.

In its 2014 Order implementing Section 6409(a) and clarifying the Section 332(c)(7) shot clocks, the Commission held that moratoria do not toll the running of the shot clocks, and thus that "any moratorium that results in a delay of more than 90 days for a collocation application or 150 days for any other application will be presumptively unreasonable."[13] But that remedy has not helped speed deployment. To invoke it, a provider must be able to file an application to start the shot clocks running – but many moratoria do not permit applications to be filed in the first place. Even if a provider could file a "test" application (knowing that it will not be acted on), it must wait as long as 150 days, then file suit under Section 332(c)(7), which will likely lead to drawn-out litigation as the city seeks to defend the reasonableness of its moratorium.

In this proceeding, the Commission proposed "to take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarification of the moratorium ban or

---

[12] Crown Castle Comments, WT Docket No. 16-421, at 17 (filed Mar. 8, 2017).

[13] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Polies,* Report and Order, 29 FCC Rcd 12865, 12971 ¶ 263 (2014).

preempting specific State or local moratoria."[14] Given the record evidence that moratoria continue to exist and to block deployment, in some instances notwithstanding the adoption of state small cell legislation,[15] such additional action is necessary. The Commission should rule that both express and *de facto* moratoria (whether interim or not) violate Sections 253(a) and 332(c)(7)(B)(i).

Denials of Access to the Rights of Way and to Municipal-Owned Structures. CTIA asks that the Commission also issue a declaratory ruling that denying access to the ROW, or to municipal-owned utility poles, streetlight poles, and traffic lights or other structures in the ROW, constitutes a barrier to service that violates Sections 253(a) and 332(c)(7)(B)(i). Small cell technology is needed to support 4G densification and 5G connectivity. These types of builds differ from those associated with the roll-out of 4G and previous generations of wireless services. Access to structures at regularly spaced intervals which are sufficiently close to enable service is essential. Utility poles, streetlights, and other municipal-owned structures offer an ideal location for small cells because they enable service where wireless traffic is typically high – along the ROW. Denying access to the ROW and facilities within the ROW, and instead requiring providers to negotiate one-off agreements with hundreds of thousands of individual private property owners, will delay and deter those services. While that approach worked in the context of far fewer macro sites associated with the deployment of prior generations of technology, it would have a substantial negative impact on current and future small facility deployments.

The record shows, however, that some localities are denying providers access to these structures.[16] For example, Cambridge, Massachusetts prohibited attachments on city-owned poles or the installation of new poles.[17] Two jurisdictions in Oregon also required submission of an alternative

---

[14] *Accelerating Wireless Deployment NPRM*, 32 FCC Rcd at 3339 ¶ 22.

[15] *See* Richard Danielson, *Tampa City Council moves ahead with new rules for 5G wireless antennas, but blasts Legislature because it can't do more*, TAMPA BAY TIMES (OCT. 5, 2017), http://www.tbo.com/news/localgovernment/tampa-poised-to-consider-new-rules-for-5g-wireless-antennas/2339881 (explaining that, after Florida adopted its small cell legislation, the Tampa City Council enacted a four-month moratorium on new permits for 5G wireless technology on city rights of way).

[16] *See* AT&T Comments, WT Docket No. 16-421, at 11-13 (filed Mar. 8, 2017) ("AT&T PN Comments"); T-Mobile PN Reply Comments at 8; Sprint PN Comments at 16-17 (listing numerous jurisdictions prohibiting new wireless facilities).

[17] T-Mobile PN Reply Comments at 8; Crown Castle Comments at 17.

site analysis demonstrating why small cells could not be located on private property before considering use of municipal infrastructure.[18]

The problem is particularly acute where localities have undergrounded electric, telephone, and cable lines, because there are then no feasible alternatives to municipal-owned streetlights and other structures. Denying access to municipal-owned structures is also arbitrary because localities frequently attach their own equipment to those structures, even though that equipment is often more visually obtrusive than small cell facilities. Denial of access to municipal-owned structures impedes service and thus violates Sections 253(a) and 332(c)(7)(B)(i).

***Undergrounding Requirements*.** The Commission should issue a declaratory ruling that laws and regulations requiring all communications facilities along ROWs to be undergrounded, without exempting wireless facilities, violate Sections 253(a) and 332(c)(7)B)(i), because they effectively prohibit the deployment of wireless service.

The record demonstrates that localities have prohibited the above-ground deployment of communications facilities in some areas.[19] Jurisdictions in California, Michigan, Texas, and Kansas, for example, adopted ordinances requiring all facilities to be underground, and thus would not allow the installation of new poles or small cell attachments to existing poles.[20]

Because wireless facilities (unlike wireline facilities) cannot be buried, undergrounding requirements that do not make exceptions for wireless facilities – particularly the antennas – thus block deployment, violating Sections 253 and 332. They are independently unlawful because they discriminate against wireless facilities and favor wireline facilities (which can be placed underground). Accordingly, they do not pass muster as a type of nondiscriminatory management of the ROW that Section 253(c) permits.

---

[18] T-Mobile PN Reply Comments at 8.

[19] See additional examples of local undergrounding ordinances in CTIA Comments at 25; AT&T Comments at 14-15; Verizon PN Comments at Appendix A; Mobilitie PN Comments at 12-13; T-Mobile Comments at 38; T-Mobile Ex Parte, WT Docket No. 17-79, Attach. at 7 (filed Sept. 21, 2017); ExteNet Reply Comments, WT Docket No. 17-79, at 13-14 (filed July 17, 2017).

[20] T-Mobile PN Reply Comments at 9; CTIA Comments at 25; Mobilitie PN Comments at 12; AT&T Comments at 15; CTIA Reply Comments at 16.

Undergrounding requirements can also violate Sections 253 and 332 in more nuanced ways. For example, they leave providers with far fewer locations on which to install their facilities. This can result in substantial increases in the attachment fees local governments charge for access to existing above-ground facilities, and as a result, significantly increase the overall cost of deployment.

Requirements to Prove a Service Coverage Gap or Business Need. The Commission should issue a declaratory ruling that laws or municipal directives requiring wireless providers to demonstrate that a particular facility or technology is needed to close a coverage gap or to meet another business need violate Sections 253(a) and 332(c)(7)(B)(i).

The record documents numerous local ordinances and regulations that impose these types of burdens on the business decisions of wireless providers.[21] For example, nearly 40 jurisdictions in California, two in Illinois, five in Minnesota, and two in Ohio required propagation maps demonstrating the need for additional wireless infrastructure to fill a coverage gap, and a number of localities in Washington required applicants for new small cell facilities to demonstrate a significant gap in coverage and to show why using ROWs is the least intrusive means to fill that gap.[22]

Conditioning grant of a permit on proving that the site is needed to close a coverage cap is a barrier to service because it effectively prohibits capacity-based deployment, and also prohibits the provision of enhanced or new services (including 4G and, soon 5G) that require deploying additional spectrum.[23] Such "coverage gap" mandates are vestiges of the past, when some localities invoked their zoning authority to require applicants for large cell towers to demonstrate why the new tower was needed. But those requirements are anachronistic today when facilities are being used to achieve critical capacity and additional services, as opposed to initial coverage. In this context, these tests can arguably never be satisfied since, by definition, a provider that is enhancing capacity is not filling a gap in coverage. And, with respect to the "least intrusive means" test, how can a provider show – out of all the poles in the ROW – that one specific pole is the "least intrusive means" (to fill a coverage gap that

[21] See examples in T-Mobile PN Reply Comments at 15-16; Mobilitie PN Comments at 13; CTIA Reply Comments at 17-18.

[22] Mobilitie PN Comments at 13; Wireless Infrastructure Association Reply Comments, WT Docket No. 17-79, at 24-26 (filed July 17, 2017); Sprint PN Comments at 21-22.

[23] *See, e.g.,* Sprint PN Comments at 16.

does not exist)? Continuing to enforce tests like this, which require a provider to demonstrate the impossible, effectively impedes service and thus violates Sections 253 and 332.

"Business need" requirements also violate Section 303 of the Communications Act, which grants the Commission plenary authority over the licensing and operation of wireless facilities. Localities may not condition approvals of new sites on their determination as to what or how much service is needed or where – any more than they can refuse to allow a TV or radio broadcaster to build a facility because they believe there are enough other stations.

Subjective or Discriminatory Aesthetic Requirements. CTIA also asks that the Commission issue a declaratory ruling that aesthetic requirements that are not objectively defined or that are unpublished, unreasonable, or discriminatory effectively prohibit service and thus violate Sections 253(a) and 332(c)(7)(B)(i).

Localities have an interest in overseeing the visual impact of new infrastructure along ROWs, and ensuring that it does not create public safety hazards by interfering with pedestrians or traffic. But the record demonstrates that many localities go far beyond advancing that interest. Instead, they impose unjustified, ad hoc, "we know it when we see it" aesthetic restrictions such as "the character of the neighborhood" or requirements that effectively prohibit new service or fail to give applicants notice of what is required.[24] Some localities refuse to grant an application because they decide a site will have an "adverse impact," without defining what the "impact" is or what types or designs of facilities cause that impact. For example, localities in California, Texas, and New York adopted "same size, same appearance" ordinances requiring case-by-case approval of any non-conforming equipment, resulting in additional costs and delays.[25]

Such unbounded and subjective regulations impede new service because they give providers no notice or certainty as to what is required. Faced with localities' demands that a site meet subjective restrictions, providers often must redesign the site, procure alternative equipment, or abandon the site

---

[24] *See* CTIA Comments at 28-29; AT&T PN Comments at 15-17; T-Mobile Comments at 39-40; Crown Castle Comments at 11, 14; Extenet Systems Inc. Comments, WT Docket No. 17-79, at 17-19 (filed June 15, 2017) ("Extenet Comments").

[25] AT&T PN Comments at 15 (another local government in California delayed a project to install 90 small cell nodes on municipal light poles for more than one year waiting for design approval).

altogether. Standards that are not published create the same barriers by failing to give providers notice of what is required.

Some aesthetic restrictions are also discriminatory because some localities have deployed their own equipment on ROW poles, such as electric transformers, sensors, traffic cameras, solar panels, and Wi-Fi antennas that can be at least as visually obtrusive as the small cell antennas the locality refuses to approve for "aesthetic" reasons. Some localities also discriminate against wireless providers by imposing aesthetic requirements on wireless equipment that they do not apply to other ROW occupants such as electric utilities, wireline carriers, and cable providers – even when those occupants have installed equipment on the same pole that the wireless provider seeks to access.[26] San Francisco, for example, singled out wireless facilities, but not similarly-sized landline or utility facilities, for discretionary aesthetic review.[27] The Commission should thus clarify that any aesthetic requirements must be non-discriminatory, in addition to being clearly disclosed and reasonable.

Sections 253 and 332 place limits on local authority; specifically, aesthetic requirements may not be employed in a way that effectively prohibit service. Providers need to know what the requirements are in advance so that they can design the site and select equipment to meet those requirements. Where a locality has ambiguous, subjective, or unreasonable, requirements, applies them selectively to discriminate against wireless services, or does not make them publicly available, deployment is frustrated.

* * *

The mandate of Sections 253(a) and 332(c)(7)(B)(i) is clear: where state or local requirements or decisions prohibit or effectively prohibit service, those requirements and decisions are unlawful. Sections 253 and 332 preserve local authority over zoning and placement of wireless facilities, but at the same time explicitly impose limits or boundaries on that local authority. It is entirely appropriate

[26] One infrastructure provider reported that "49 percent of surveyed communities subjected Extenet to processes and standards that differed from those required of wireline providers and utilities in public ROWs, even though Extenet's attachments are similarly-sized and impose no greater ROW management burden than their wireless or utility counterparts."; Extenet Comments at 17-19. *See also* T-Mobile Comments at 7; WIA Comments at 59.

[27] T-Mobile Comments at 40.

for the Commission to establish guideposts through a declaratory ruling as to the interpretation and application of Sections 253 and 332. Doing so is fully consistent with the localities' permissible authority, as preserved and bounded by these statutory provisions. To fulfill the purpose of Sections 253 and 332 and achieve the bedrock objective of this proceeding – to remove barriers that are impeding broadband deployment – the Commission should affirm the *California Payphone* decision and declare that none of the barriers discussed above is consistent with the Communications Act. That action will accelerate the deployment of infrastructure that is essential to the nation's future.

Pursuant to Section 1.1206(a) of the Commission's rules, a copy of this letter is being electronically submitted into the record of these proceedings. Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Kara Romagnino Graves
Kara Romagnino Graves
Director, Regulatory Affairs